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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 92-3
Table of Allotments,	)	RM-7874, RM-7958
FM Broadcast Stations	)	
(Prineville and Sisters, Oregon)	)	

To: The Chief, Mass Media Bureau

REPLY

Various radio licensees serving Central Oregon communities (collectively, the "Licensees")[1/] hereby Reply to the December 17 Opposition of Schuyler H. Martin ("Martin") to the Licensees' Petition for Reconsideration ("Petition") of the Report and Order, 57 Fed. Reg. 47006 (1992). The Petition showed that the staff failed to protect FCC processes from abuse and that the Bureau must reverse the staff's most troubling refusal to even look into the underlying circumstances and the evident abuse of process that has transpired here. Martin's Opposition alleges that the Petition has procedural and substantive defects. But it is Martin's Opposition which is the defective pleading. It utterly lacks merit: Martin seeks to cloud the issue and thereby permit his scheme to defraud the Commission to succeed.

1/ Central Oregon Broadcasting, Inc. (KBND, Bend, and KLRR, Redmond); Stewart Broadcasting, Inc. (KPRB and KSJJ, Redmond); Highlakes Broadcasting Company ("Highlakes")(KRCO and KIJK-FM, Prineville); JJP Broadcasting, Inc. (KQAK, Bend); Oak Broadcasting, Inc. (KGRL and KXIQ, Bend); Sequoia Communications (KICE, Bend); and The Confederated Tribes of the Warm Springs Reservation of Oregon (KTWS, Bend, and KTWI, Warm Springs).

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List A B C D E

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I. BACKGROUND

1. The Licensees have presented strong evidence that:

(a) Danjon, Inc. ("Danjon") hoodwinked the staff into issuing a Notice of Proposed Rule Making proposing to allot Channel 284A to Prineville, Oregon as "a first local service;"

(b) Danjon thereby created a Trojan Horse that allowed Martin to "counterpropose" an upgrade of his unbuilt Sisters, Oregon construction permit from Channel 281A to Channel 281C1;

(c) Danjon and the anonymous engineer who ran spacing studies on Danjon's (or Martin's) behalf had to know that Danjon's characterization of its request as for a "first local service" was false;

(d) Danjon and the mystery engineer also had to know that many other, more technically desirable channels were available for use at Prineville other than Channel 284A;

(e) Those many other, more desirable channels would not conflict with Martin's planned Sisters upgrade, and thus could not support a synthetic "Counterproposal;"

(f) Danjon's two purported grounds for attempting to withdraw its Petition were false, because Danjon had to know that licensed stations already served Prineville, and because, contrary to its assertions, Danjon had no chance of reasonable assurance of the availability of its self-chosen reference point for use as a transmitter site;

(g) Martin and the "distinguished consulting engineering firm" which ran spacing studies on his behalf also had to know that Danjon's characterization (repeated by Martin) of Prineville as bereft of local service was false;

(h) Martin and his distinguished consultants also had to know that many other, more technically desirable (but nonconflicting) channels were available for use at Prineville other than Channel 284A; and

(i) Under the D.C. Code of Professional Responsibility, preexisting links between Danjon and Martin's counsel required the two to consult prior to the preparation and filing of Martin's "Counterproposal."

2. Danjon has not opposed the Petition, but Martin has. Martin defends Danjon's honor and presents a general denial of the Licensees' charges, but provides no specific factual support. Martin asserts that the Licensees' Petition: (1) is untimely; (2)

unlawfully seeks to introduce new matter; (3) is wrong on the merits; (4) represents an abuse of the Commission's processes; and (5) attempts to prevent Martin from gainfully competing with the Licensees. Charges one through three are simply false. Charges four and five are both false and outrageous.

II. ARGUMENT

1. Martin's Procedural Arguments Are Faulty

A. The Petition Was Timely

3. Martin wrongly claims, as he has in his multiple pre-Opposition pleadings,[2/] that the Licensees filed their Petition late. The Licensees have rebutted that claim in their responses to Martin's various pleadings. There is no need to disprove Martin's absurd lateness claim once more.[3/]

B. The Petition Does Not Improperly Introduce New Matter

4. Martin also claims that the Petition improperly introduces new matter, and requests that the Bureau thus strike the supporting Technical Statement of Robert Arthur McClanathan, P.E., and all arguments based thereon. Martin is wrong. Section 1.106(c)(1) bars the Petition's reliance on newly presented facts unless the facts relate to events that occurred or circumstances that changed since the last opportunity to present them, or are

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2/ Martin has filed a Motion to Strike the Petition, a Petition for Declaratory Ruling, a Petition for Reconsideration of the staff's mere release of a Public Notice of the Petition's filing, and related Replies.

3/ However, with regard to matters of timing, at least twice Martin has effected service on counsel to the Licensees later than Martin has certified to the FCC. See Exhibit A.

facts the petitioner could not have discovered earlier through ordinary diligence. That provision does not bar Mr. McClanathan's statement.

5. Mr. McClanathan simply relates the standard industry practice, when a client desires a new allotment or an upgrade, to scan the entire nonreserved FM band to ascertain the available options. He also describes the standard criteria for selecting from among available channels. Mr. McClanathan further relates that the standard practice would have revealed both the existence of a Class C1 station licensed to Prineville and the availability of many technically superior channels. Danjon's choice of Channel 284A and Danjon's (and Martin's) assertions that Prineville lacked a local service fly in the face of what Danjon had to have learned from its mystery engineer and what Martin had to have learned from his distinguished consultants.

6. Mr. McClanathan's statement does not constitute new matter. It reiterates the arguments that the Licensees made at pp. 5-7 of their Reply Comments, before the Report and Order ever issued. It also directly contraverts the Report and Order's belief that no ulterior motive necessarily attached to Danjon's selection and characterization of Channel 284A. Finally, even assuming arguendo that the statement constitutes new matter, Section 1.106(c)(2) justifies its consideration. The public interest requires the FCC to consider all evidence relevant to a serious abuse of the Commission's processes.

2. Martin Is Wrong On the Merits

7. During the Senate confirmation hearings concerning the appointment of Judge Clarence Thomas to the Supreme Court, Senator Howell Heflin of Alabama recounted advice he had received from a veteran practitioner many years before, early in his career as a trial attorney. The experienced attorney advised the future Senator that, in litigation, he should argue the facts if the facts supported his theory of the case. The veteran then advised that, if the facts did not support the theory of the case but the law did, then the newcomer should argue the law. Finally, the practitioner advised, if neither the facts nor the law supported the tyro's theory of the case, the young attorney should confuse the issue. Martin obviously subscribes to the veteran's approach to litigation: his Opposition seeks to confuse the issue, because neither the facts nor the law help him.

8. First of all, contrary to Martin's assertion, the Licensees have **not** demanded a formal Section 403 enquiry. They have rather asked the FCC to inquire, either in the context of the rule making proceeding or by any other appropriate means, to investigate this proceeding's underlying circumstances. Second, because it obviously suits his purposes, Martin cynically repeats the staff's error in faulting the Licensees for not proving the occurrence of an abuse of process. That was not the Licensees' burden of proof. **At most**, all they need do is show that a substantial and material question exists that an abuse occurred.

Proof of the fire is not required, only of a good deal of smoke,[4/] and the Licensees have more than supplied that.

9. Martin observes that the FCC staff's NPRM also characterized Channel 284A as a potential first local service. Thus, he claims, Danjon should not be held to a higher standard than the staff. But what Martin ignores is the staff's obvious and reasonable reliance on Danjon's statement, which reliance makes proffering the falsehood all the more reprehensible.[5/]

10. Although Martin defends Danjon's actions, Martin has supplied neither any discussion of the occurrence nor details of any communications it has had with Danjon. Nor has Martin supplied the identity of or a statement from the mystery engineer who provided the spacing study Danjon used. Among the relevant issues that Martin takes pains not to address are the scope of the engineer's activities, who retained and paid the engineer, the results of the engineer's studies, and to whom the engineer provided those results. A pro forma denial is insufficient. Further enquiry is mandated, given the major portions of the

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4/ Astroline Communications Company Limited Partnership v. FCC, 857 F.2d 1556 (D.C. Cir. 1988); Citizens for Jazz on WRVR v. FCC, 775 F.2d 392 (D.C. Cir. 1987).

5/ "This Court and the Commission have noted on numerous occasions that 'applicants before the FCC are held to a high standard of candor and forthrightness.' WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1139 (D.C. Cir. 1985); see also RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981)." Astroline, 857 F.2d at 1564. "Our scheme of regulation rests on the assumption that applicants will supply [us] with accurate information. * * * The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees." Character Qualifications, 102 FCC 2d 1179, 1210-1211 (1986).

mosaic that the Licensees have assembled without any benefit of discovery. Astroline, 857 F.2d at 1567 (D.C. Cir. 1988).[6/]

11. Martin further alleges that any pre-filing contacts he may have had with Danjon were not improper, because parties may synchronize bona fide filings before the FCC to attain strategic advantages. The synchronization of bona fide filings may raise questions of propriety, but that issue is a red herring. This case involves completely different and far more sinister conduct -- the filing of a proposal (Danjon's) that **could not** have been bona fide in a crass effort to attain a goal (Martin's upgrade) that might have eluded Martin absent his stacking of the deck.

12. Martin charges that the Licensees' real objection is that Martin is on the verge of achieving his upgrade and becoming a formidable competitor. Martin claims that **the Licensees'** filings are abuses of the FCC's processes and unlawful attempts to forestall competition. Martin also claims that the Licensees' real gripe is their inability to file a Counterproposal directly or through a "strawman" that would doom Martin's upgrade.

6/ "It is true, especially in a situation such as this where the factual question at issue is the intent of a party, that proof of the disputed fact may turn on inferences to be drawn from other facts. For example, non-inferential or non-circumstantial evidence of intent can be given only by one party -- the party whose intent is in question. * * * As this court has noted in a similar case, it is fundamentally unfair for FCC to dismiss a challenge where the challenging party has seriously questioned the validity of a representation and the defending party is the party with access to the relevant information. See Citizens Committee to Save WEFM v. FCC, [506 F.2d 246,] 265-266 [(D.C. Cir. 1974)(en banc)]." California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1985).

13. Martin's upgraded facility would obviously seek to compete with the Licensees' stations, which gives the Licensees standing to participate in this proceeding. FCC v. Sanders, 309 U.S. 470 (1970). But Martin's charges that it is the Licensees who are abusing the Commission's processes, that the Licensees unlawfully seek to restrain competition, and that the Licensees are enraged due to their inability to torpedo Martin's upgrade with a strike Counterproposal, are scurrilous.

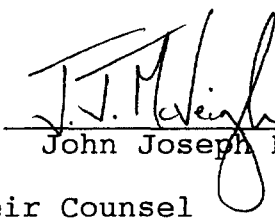
14. The Licensees have nothing against fair competition in the marketplace. What the Licensees object to is illegal exploitation of FCC processes to attain competitive advantage without going through the same rigors that others (including at least one of the Licensees) have had to endure to achieve their own upgrades. The Licensees have the legal privilege and the moral duty to focus the FCC's attention on conduct that tramples its processes and the rule of law. To assert that bringing such machinations into the daylight for due consideration by the FCC is abusive and illegal is Martin's ultimate crass attempt to confuse the issue. He blatantly seeks to divert the FCC's attention from his own abusive actions, and thereby escape those actions' legal consequences during the ensuing hubbub. And Martin's vulgar charge that the Licensees are frustrated by their inability to now file a strike Counterproposal does not warrant the dignity of a Reply.

III. CONCLUSION

Martin's Opposition does nothing to dispel the pungent smoke that permeates this proceeding. To safeguard the integrity of its own processes and to deter others from copying Martin's cynical attempt to exploit them, the Bureau must reverse the staff and inquire into this matter.

Respectfully submitted,

THE LICENSEES

By 
John Joseph McVeigh

Their Counsel

Fisher, Wayland, Cooper and Leader
1255 Twenty-third Street Northwest,
Suite 800
Washington, D.C. 20037-1170
(202) 659-3494

Date: December 24, 1992

EXHIBIT A

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that I have on this 11th day of December, 1992, sent copies of the foregoing "Petition For Reconsideration" by First-Class U.S. Mail, postage prepaid, or via hand-delivery, as indicated below, to the following:

Roy J. Stewart, Esq. *
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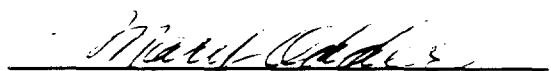

Mary Odder

*/ Via Hand-Delivery

DOC #12077564

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that I have on this 17th day of December, 1992, sent copies of the foregoing "Opposition To Petition For Reconsideration" by First-Class U.S. Mail, postage prepaid, or via hand-delivery, as indicated below, to the following:

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*/ Via Hand-Delivery

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DECLARATION OF RICKY A. PURSLEY

I, Ricky A. Pursley, do declare as follows:

1. I am Law Librarian and a Senior Legal Assistant employed by the law firm of Fisher, Wayland, Cooper and Leader since March 25, 1985.

2. Attached to this Declaration are photocopies of parcel delivery logs which Fisher, Wayland, Cooper and Leader maintains in the normal course of business. I certify that these photocopies are genuine copies of the original logs, which are maintained under my direct supervision and control.

3. The sheet which contains the date of December 14, 1992 includes recordation of a parcel delivery at 9:50 a.m. from "Kaye, Scholer, Fierman H & H" to "JJM." "JJM" signifies John Joseph McVeigh, a partner with Fisher, Wayland, Cooper and Leader. The log entry also indicates that the parcel was given to "RAP." "RAP" are my initials. I did, in fact, take the parcel to Mr. McVeigh shortly after it arrived by courier at 9:50 a.m. on December 14, 1992.

4. The sheet which contains the date of December 18, 1992 includes recordation of a parcel delivery at 10:27 a.m. from "Kaye, Scholer" to "JJM." The log entry also indicates that the parcel was given to "Gwen." "Gwen" is Gwendolyn Jones, an Administrative Services Clerk employed by Fisher, Wayland, Cooper and Leader. Ms. Jones has indicated to me that she did in fact give that parcel to Mr. McVeigh. At the time of preparation of this Declaration, Ms. Jones was out of the office for the holidays, and unable to execute a Declaration of her own.

All of the foregoing information is true and correct to the best of my knowledge, information and belief, under penalty of perjury.

Ricky A. Pursley

Date: December 23, 1992

DATE/TIME	SOURCE (UPS/FEDEX COURIER/ OTHER)	FROM	TO	GIVEN TO
12-10 1057	Courier	ADP	FMO	Todd
12-10 1105	Courier	Arnold + Porter	BJ	Tony
12-10 1224	Courier	Paton, Boggs + Blow	BKM	Todd
" 2:14	Courier	Fairpress	RAP	Todd
" 2:16	UPS	Best Programs	BH	"
" "	"	Holme, Roberts + Owen	DDO	"
" "	"	Flynn + O'Hara	DZ	"
12-10 2:34	Courier	NAB	BKM	Todd
12-11 10:13	Airborn	DFW	Ken	Ronnie
" 10:22	Fed Ex	Jim Ingalsbe	CMH	Rhea
" "	" "	Ann Federoff	BDJ	Todd
" "	" "	William F Hubbard	DDO	Valm
" 1:52	Fed Ex	Sue Watson	Ken H	
" 1:50	" "	Devon Porter	Bob E	
12-14-92 9:22	UPS	Bermuda Cablevision	BC	RAP
" 9:41	Airborn	Paxson BC	HL	D M.
" 9:50	couriers	Kaye, Scholer, Fierman H&H	JTM	RAP
" 9:50	"	dataworld	DDO	RAP
" 10:05	Fed ex	Kim Glen	KRS	Bob
" "	"			
" "	"			
" 10:29	Courier	Atlantic Research Corp	GM	RAP
" 10:33	"	O'melveny	G Cooper	Ronnie
1 10	Fed EX	Cornell Weiss Develop.	EG	TODD
" 1:26	Courier	Bert Fox	DW	PLC
257	Courier	Fairpress	KH	
304	Courier	Wiley, Rein, Fielding	KH	KH

DATE/TIME	SOURCE (UPS/FEDEX COURIER/ OTHER)	FROM	TO	GIVEN TO
12/17 9:47	UPS	Michael A Duckrain[?]	Matt	Frank
10:13	FedX	Tickhand[?]	CH	CH
"	" "	William	AF	Ricky
"	" "	Dr. Ken Wroo[?]	FM	FM
"	" "	Stansell	ML	Ricky
"	" "	John Rousso[?]	Ken H	Ken
"	"	Richard Ozenbaugh[?]	Del C	Jackie
" "	Fed X	V.C. Stone	JJM	Ron
"	"	Randy Holland	Matt Z	Ron
"	"	KOVC Radio	CH	CH
"	"	Carolyn Osborne[?]	EG	Ron
"	"	Sue Watson	DDO	Ricky
2[49]	Courier	Fairpress[?]	RHP	Ron
3[18]	Courier	Sterling Graphics	JRK	
5[29]	Courier	EDS	BRM	
5[58]	Courier	N/A	MRL	FRONT DESK
12/18 9:41	other	Vector	BB	Ron
9:48	UPS	Liggett	John B	BH
"	"	R Bruce Carruthers	" "	BH
"	"	John J. Mullaney	JJM	Ron
10:27	Courier	Kaye Scholer	JJM	Gwen
10[34]	Courier	Holland + Knight	BG	Ron

CERTIFICATE OF SERVICE

I, Renee Gray, a secretary to the law firm of Fisher, Wayland, Cooper and Leader, hereby certify that I have this Twenty-fourth day of December, 1992, sent copies of the foregoing "REPLY" by first class United States mail, postage prepaid, to:

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Renee Gray

Renee Gray

* -- By Hand Delivery